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In the Supreme Court of the United States.

October Term, 1895.

THE UNITED STATES, APPELLANT,
v.
CHARLES F. ELDER ET AL.,
No. 35.

PECOS GRANT, IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
CLARENCE P. ELDER ET AL. } No. 35.

CEBOLLA GRANT, IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

This suit was instituted in the Court of Private Land Claims on February 18, 1893, by Clarence P. Elder and Thomas B. Catron filing their petition for the confirmation of the Juan C. Santistevan or Cebolla grant, situate in Taos County, N. Mex.

In that petition (R., 1, 2) it is alleged that on December 31, 1845, Manuel Armijo, governor of New Mexico, made a grant of the tract in question to Juan Carlos Santistevan and four others, the boundaries of the same being described as follows:

> On the north, by the limits of the Rio Colorado tract; on the south, by the dividing line of the San Cristoval; on the east by the mountains, and on the west by the rocky bluffs of the Rio del Norte.

That under the provisions of the act of Congress of July 22, 1854, the surveyor-general of New Mexico, on March 23, 1872, recommended this grant for confirmation by Congress, and that a survey of the same was made in November, 1877, under the direction of the General Land Office, which was approved by the surveyor-general of New Mexico, according to which said grant contains 17,159.57 acres, but claimants allege that said survey was not made in accordance with the boundaries set forth in the original documents of said grant.

It was further alleged that the petitioners were the owners in fee of said grant, which had been in the peaceable and undisputed possession of the original grantees, their heirs, and legal representatives from the making of the grant to the present time; that the title of the original grantees, their heirs, and assigns was complete and perfect when the United States acquired sovereignty over the Territory of New Mexico.

With other formal allegations, the petition closed with the usual prayer for confirmation.

The United States filed an answer (R., 3, 4), putting in issue the allegations of claimants' petition.

On August 28, 1896, the cause came on for trial, when the plaintiffs tendered in evidence their title papers (R., 33–38). The genuineness of these documents was not questioned by the Government, and the only criticism it made as to them was that the indorsement thereon by Governor Armijo (R., 36), dated December 31, 1845, did not constitute a grant of the land. This indorsement is as follows:

> SANTA FE, *December 31, 1845.*
>
> To the prefect of the district to ascertain if the land asked for has no owner and to cause the corresponding justice to give the possession the petitioner refers to.
>
> ARMIJO, [Rubric.]
> JUAN BAUTISTA VIGIL Y ALARID, [Rubric.]
> *Secretary.*

Documentary evidence, tending to connect the plaintiffs with the original grantees, was received (R., 5, 6), and it is stipulated by the Government on this appeal (R., 65) that claimants have sufficiently connected themselves with the original grantees to invoke the jurisdiction of the Court of Private Land Claims.

There was also oral evidence showing some possession by the original grantees and those claiming under them. (R., 8, 9, 17, 20, 22, 23.) This evidence is mostly as to possession since the date of the treaty. The depositions of witnesses examined in the proceedings before the surveyor-general in 1872 were also introduced in evidence by the claimants (R., 41, 42), which tended to establish the authenticity of the grant papers and show some possession by the original grantees.

The only issue of fact developed at the trial was as to

the location of the north and south boundaries of the grant, and upon these two points the testimony of old residents of that section was presented by both parties, which forms the bulk of the oral testimony at the trial. (R., 6–32.)

The petition to the governor, properly translated (see Appendix One), asked for "a vacant tract, very suitable for cultivation, irrigable from certain water which they call [the water] of the Lama, quite sufficient for its irrigation, at the place which is so called and even another place which they call the Sebolla, and which are between the settlement of the Rio Colorado and San Cristobal." The report of the alcalde who placed the grantees in juridical possession states that such possession was taken by them "as being lawful proprietors of the land which they wish to irrigate with the waters of the valley of the Lama, as, relying upon that small water source, they had applied for the donation; and I therefore designated to them for limits on the north, the boundaries of the Rio Colorado grant; on the south, to where the dividing line of San Cristobal is reached; on the east the mountain, and on the west the edge of the bluff of the Rio del Norte," etc. (R., 37.)

The plaintiffs claimed as their northern boundary the top of the bluff or ridge forming the southern bank of the Rio Colorado; and as their southern boundary a point at an acequia claimed to be the northern limits of cultivation of the San Cristobal grant or settlement.

The Government introduced in evidence the proceedings had before the surveyor-general in relation to the Rio Colorado grant and the Rio de San Cristobal grant,

and the original grant papers in each case (R., 44–60), for the purpose of showing their boundaries as bearing upon this grant.

The Government contended that the proper boundaries of this tract should be and were intended to be the respective ridges inclosing and bounding naturally the valley of the Lama River on the northern and southern sides, and in support thereof testimony was heard showing that there is a wide stretch of high table-land between the Lama Valley on the north and the bluffs 2 or 3 miles farther north, which constitute the south bank of the Rio Colorado, and that there is a valley or depression, called the Cañada Garrapata, between the first ridge south of the Lama Valley and another ridge a considerable distance farther south toward the San Cristobal. (R., 24–31.)

The legal propositions contended for by the Government, among others, were, *first*, that the governor had no authority at the date of this grant to make the same; *second*, that even if he had authority the indorsement by Governor Armijo on the muniments of title was not a grant; *third*, that even assuming the indorsement to be a grant and Armijo to have had authority to make it, the claim as presented was not such a one as the Court of Private Land Claims was authorized to confirm; *fourth*, that if the claim should be adjudged entitled to confirmation only the irrigable or cultivable lands within the limits named in the act of possession should be confirmed; and that the east boundary mentioned in said act of possession should be fixed at the foot and not the summit of the mountain.

On September 5, 1896, the court, through Mr. Justice Stone, announced its decision (R., 62, 63), holding the title paper presented to be a grant entitled to confirmation to the outboundaries named in the act of possession, extending to the top of the mountain on the east, but fixing the north and south boundaries as contended for by the Government. A decree of confirmation was entered on December 2, 1896.

The United States prayed an appeal, and the same having been allowed (R., 64), the cause is now before this court for determination.

ARGUMENT.

The decision of the Court of Private Land Claims should be reversed and the claim rejected for the following reasons:

1. The departmental governor had no authority at the date of this grant to make the same.

2. Even if he had such authority, the indorsement by Governor Armijo in the muniments of title here presented is not a grant.

3. Assuming this indorsement to be a grant and to have been made under the colonization law of August 18, 1824, and the regulations of November 21, 1828, as contended for by claimants, and as held by the court, this is not such a claim as the Court of Private Land Claims had jurisdiction to confirm.

4. This claim can not be confirmed for the reason that there is no archive evidence of the same and no record of the alleged grant in the archives derived from the former government.

5. The confirmation in this case is excessive in that it is for the entire tract within the boundaries named by the alcalde instead of for only the irrigable or cultivable lands within said boundaries, and in that the east boundary is fixed at the summit of the mountain instead of at the foot.

I.

The departmental governor had no authority at the date of this grant to make the same.

The date of the order of Governor Armijo relied upon as a grant is December 31, 1845. At this date there was no power in the governor of the department of New Mexico to make a grant, certainly none to make a gratuitous concession such as this. This subject has already been fully discussed in the brief for the United States filed in this court in the case of *Luis M. Ortiz et al.* v. *United States*, No. 20, on the docket for the present term. It does not seem necessary to repeat the considerations there urged under point *one*, which are entirely applicable to the claim here asserted.

II.

Even if the departmental governor had authority to make a grant, the indorsement by Governor Armijo on the muniments of title here presented is not a grant.

The translation of the title papers, filed by claimants, is inaccurate in a number of respects, and a translation of the same prepared on behalf of the Government is attached to this brief as Appendix number *one*. From

this document it will be seen that the order made by Armijo on the petition presented by claimants is as follows:

> SANTA FE, *December 31, 1845.*
>
> To the prefect of the district to ascertain if the lands asked for has no owner and to cause the corresponding justice to give the possession the petitioner refers to.
>
> ARMIJO. [Rubric.]
> JUAN BAUTISTA VIGIL Y ALARID, [Rubric.]
> *Secretary.*

The only theory upon which the power of the governor to act at all in this matter can be sustained is that he was authorized so to do by the colonization law of August 18, 1824 (Reynolds, p. 121), and the regulations pursuant thereto, dated November 21, 1828. (Reynolds, p. 141.) These regulations provide (sections 3 and 4) as follows:

> 3. The political chief shall proceed immediately to obtain the necessary information as to whether or not the conditions required by said law of the 18th of August are found in the application, both as regards the land and the applicant, either that this latter be attended to simply or that he be preferred, and shall at the same time hear the respective municipal authority as to whether any objection or not is found to the grant.
>
> 4. In view of all of which the political chief shall grant or not said application, in strict conformity with the law applicable to the matter, especially with that of the 18th of August, 1824, already cited.

In *Cambuston's Case* (20 How., 59) this court construes the regulations of 1828, just quoted in part, as providing (1) that the governors may make grants to persons who

ask for them for purpose of cultivation and inhabiting same; (2) applicant shall address a petition, giving name, country, and religion and describing lands by means of a map; (3) political chief or governor shall institute inquiry as to the propriety of the grant; (4) shall then accede or not in conformity to the law; (5) definitive grant asked for being made, a document, signed by the governor, shall be given to serve as a title; (6) the necessary record shall be kept in a book provided for that purpose, etc.

Thus it was the duty of the governor to "institute inquiry as to the propriety of the grant." This, it is assumed, he attempted to do by the above-quoted reference to the prefect. The prefect got rid of the responsibility by referring the matter to the justice of the peace. Until the prefect had reported to the governor, or the latter had secured information in other ways, the grant could not legally be made. Inquiry as to the propriety of the grant must necessarily precede the grant. This throws light on the order of Armijo, above quoted, and the latter portion thereof wherein the prefect is directed to cause the corresponding justice to give the possessions the petitioners refer to. This could not have been possession under the grant, for that had not yet been made, and indeed could not legally be made until the coming in of the prefect's report. The possession thus referred to must therefore have been a temporary possession, one ordered in view of the urgent present needs of the claimants who were there near the premises, a mere permissive possession whose development into a title depended entirely upon whether the governor in view of the whole investigation should "grant or not said application in

strict conformity to the law applicable to the matter." Had the order of the governor contained a direction to the prefect to report back to him for his further action in the premises, it would hardly be contended that that order constituted a transfer of title; and yet the regulations of 1828, when read into the order of the governor, as they must be if he was acting under them, made it as much the duty of the prefect to report back his investigation to the governor for his decree as if the governor had said so in plain words. If, on the other hand, the construction given by the claimants to the order of December 31, 1845, be correct, then that order was, in effect, a delegation by the governor to the prefect of the power to say whether there should be a grant; and as the prefect delegated the matter to the justice of the peace, with direction to "grant them as much of the land as each can cultivate," the question of whether these petitioners should have a grant was finally a matter upon which the justice of the peace was the arbiter. It requires only a glance at the above-quoted regulations, however, to show that the governor had no power to delegate these functions either to the prefect or the justice of the peace. The regulations of 1828 make the governor—not the prefect nor the alcalde—the official who should "grant or not said application" after investigation. If this was an attempt by Armijo to leave to the officials named the question of whether possession should be given the petitioners, it was void as unjustified by any law. If, on the other hand, it was a direction to them to investigate the matter, to give the petitioners temporary possession, and to report to him for his further action, as provided by the

sections of the regulations above quoted, it does not appear that any further action was taken, and no rights such as should be considered "property" under the treaty of 1848 became vested. The authorities are abundant to the effect that a mere temporary or permissive possession confers no property rights which this Government is under obligation to respect. (*De Haro* v. *United States*, 5 Wall., 599; *Serrano* v. *United States*, 5 Wall., 451.)

The facts of the present case are not unlike those developed by the case of *Bergere* v. *United States* (168 U. S., 66), recently decided by this court on appeal from the Court of Private Land Claims.

While it is true that in that case explicit direction was given the alcalde to return the possession conferred to the governor for approval, that obligation existed in the case under discussion as a matter of law as fully as though Armijo had inserted in his decree of December 31, 1845, a specific direction to that effect. Indeed, as above argued, his delegation of the exercise of discretion being unauthorized, the "grant" of "as much land as each can cultivate," by the alcade was a nullity until returned to Armijo and approved by him.

III.

Assuming this indorsement to be a grant and to have been made under the colonization law of August 18, 1824, and the regulations of November 21, 1828, as contended for by claimants, and as held by the court, this is not such a claim as the Court of Private Land Claims had jurisdiction to confirm.

This grant was never approved by the departmental assembly as provided by section 5 of the regulations of 1828. It was thus not perfect at the date of the treaty, and the grantees had no right to demand such approval from the assembly, or, in other words, no right to demand that the grant be made perfect. The case made on the record is, as to this point, precisely the same as that of the Sierra Mosca claim (*Ortiz* v. *United States*, No. 20, this term), and reference is made to Point *Two* of that brief, where this proposition, as applied to that character of title, is fully discussed. The possession of the claimed premises shown by the present record is almost, if not quite as flimsy, as that shown by the Sierra Mosca record, and raises as little equity in behalf of claimants. In this case the only evidence of occupation prior to the treaty, outside of the glittering generality in which witness Quintana indulged before the surveyor-general (R., 42), when he said in response to the question as to who had possession of the land since 1846 that "the grantees possessed it until they sold it to Jose Gonzales," is the testimony of Antonio Laforet (R., 23), to the effect that in 1846 three of the grantees were occupying small strips of land, each about 100 varas or yards in width. Such a possession, under the *Peralta Case* (3 Wall., 434, 441), raises no substantial equity. There is nothing in the record to create the presumption that the departmental assembly would have been moved as a matter of grace, much less of right, to make this grant perfect by approving it.

IV.

This claim can not be confirmed for the reason that there is no archive evidence of the same and no record of the alleged grant in the archives derived from the former Government.

The necessity of archive evidence of a grant and of proof of record of the same under the former Government has been fully discussed under Point *Three* in the Government brief in the Ortiz or Sierra Mosca Case, No. 20, this term, and without quoting again from all the authorities there set forth, it seems sufficient simply to call the court's attention to a few of these and to invite its consideration of the others there cited.

There is a complete absence from this record of archive evidence of the grant sued on. This claim rests solely upon a document produced from private hands before the surveyor-general in 1872. This *quantum* of evidence under the California grant cases, decided by this court, is insufficient to justify a confirmation. Thus, in the *Bolton Case* (23 How., 347), it is held that the record required by section 9 of the regulations of 1828 (R., 142) is "the evidence of the grant," and that while the *titulo* given by the governor "serves among individuals the purpose of evidence," the Government when it institutes inquiries in reference to the subject is "entitled to require the production of that official record, which it has prescribed to its officer, for its own security and as a necessary condition of a legal administration and a necessary precaution against fraud."

The case of *Knight's Administrator* (1 Black, 228) is a leading one on this subject, the opinion of the court being in part as follows:

> But a more decisive answer to the claims remains to be stated, and that is *that there is no record evidence that the grant was ever issued, and without such evidence the claim can not be confirmed.* That rule is founded upon the Mexican law, and has been so repeatedly announced by this court that it seems unnecessary to adduce any argument in its support.

The *Neleigh Case* (1 Black, 298) reiterates the rule, as follows:

> A paper purporting to be a grant of land in California, first produced from the custody of a claimant after the war, and unsustained by any record evidence, will not be held valid by this court. * * * Evidence of the destruction of archives during the war does not avail the holder of such a naked grant, unless he can show *where* and *how the specific papers necessary to complete his title were lost or destroyed.* * * * The court again affirms the doctrine *that the testimony of Mexican officials can not be received to supply or contradict the public records.*

So in the *Romero Case* (1 Wall., 743) it is said:

> Suppose it be conceded, however, that the probative force of the parol testimony is not overcome by the contrary tendency of the written evidence, the concession could not benefit the claimants, *because the case is one where there is no record evidence of any kind* to prove either the existence or the authenticity of the grant. Assuming that state of the case, then it falls directly within the class of cases where the confirmation has been refused because there was no record evidence to support the claim. (Citing numerous cases.)

In the *Vallejo Case* (1 Black, 541) the court, referring to the regulations of 1828, says:

> It is sufficient to say that the system thus established by the sovereign power of the nation for the grant and distribution of the public lands exhibits a deliberation and care over the subject that is in striking contrast with the system of granting the public lands under our Government, and furnishes the highest evidence *of the extreme interest the Mexican Government* took in guarding against impositions and frauds by or upon the political chiefs in the execution of the law. * * * No record was made of the title. * * * It was well said in *The United States* v. *Sutter* (21 How., 175) that "in a very well regulated government the deeds of its officers conveying parts of the public domain are *registered or enrolled*, to furnish permanent evidence to its grantees of the origin of their title. * * * It is important also that a record should be made of those grants, so that the Government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of the Government, where the public records are kept and a record can be readily made, or, if signed by the public officer residing at a different place, *are not deemed grants till the proper record is made.*"

The case of *Berreyesa* v. *United States*, decided by this court and found in 23 Lawyer Cooperative Edition, 913, goes still further and holds that a Mexican grant will be *rejected* where it does not appear that it "has been de-

posited and recorded in the proper public office among the public archives of the Republic."

Perhaps the latest case on the subject is that of *Peralta* (3 Wall., 434). In that case the documentary evidence was quite complete, much more so than in the case now under consideration, and yet the court holds:

> There was neither grant nor archive evidence. If there had been a grant according to law the *expediente* would have remained in the archives, but there is no trace of it there, and it is produced from *private hands, which tends strongly to show that the governor never saw it.*

Speaking of the California act, the decision of the court thereon and the policy of the Mexican nation, as to a permanent record of grants of its domain, the court says:

> Very many claims were tested by the rules and found to be valid and were confirmed; others were imperfect and could not be recognized. Then commenced a struggle, which has never been abandoned, to induce the courts to fritter away the act of Congress and *substitute parol proof for record evidence.* The history of the cases in this court from California show the extent of the struggle and the result. We have refused to allow oral testimony to prevail where archive evidence was necessary. * * * The Mexican nation attached a great deal of force to the disposition of its lands and required many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is, that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition and enabled the Government to ascertain with accuracy what portion of the public

> lands had been alienated. *The record was the grant and without it the title was not divested.* The governor was required to give a document to the party interested, which was evidence of title and enabled him to get possession; but this "*título*" *did not divest the title unless record was made in conformity with law.* Written documentary evidence, *no matter how formal and complete or how well supported by the testimony of witnesses will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed.*

The court goes on to say, in regard to the contention that the party in interest should not suffer where the archives have been lost or destroyed:

> This is true; and if the claimant can show to the satisfaction of the court *that the grant was made in conformity to law and recorded, and that the record of it has been lost or destroyed*, he will be permitted to introduce secondary evidence of it. *But the absence of record evidence is necessarily fatal*, unless that absence can be accounted for.

Under the authority just cited, which is last of a long line of cases, and is thus the mature and final judgment of this court upon a subject with which it has had to deal repeatedly, the record *was* the grant, and without it the title was not divested. No matter how formal and complete the documentary evidence, or how well supported by oral testimony, the title is insufficient if produced from private hands and there is nothing in the archives to corroborate it.

This statement of the law is conclusive of the present

case in that it has the radical defect of being founded upon a paper produced from private hands and without archive record or corroboration.

V.

The confirmation in this case is excessive, in that it is for the entire tract within the boundaries named by the alcalde instead of for only the irrigable or cultivable lands within said boundaries, and in that the east boundary is fixed at the summit of the mountain instead of at the foot.

An examination of the title papers presented (Appendix No. One) will show that the petition for this claim was presented by one Carlos Santistevan for himself and his five associates. In his petition he states that they are "without land as property *to cultivate*," and that they have seen a vacant tract "very suitable for cultivation, irrigable by certain water, which they call [the water] of the Lama at the place which is so called and even another place which they call Sebolla." He proceeds further to state that the said places are "between the settlement of the Rio Colorado and San Cristoval," but there are no boundaries given, and the only additional item of description is the statement that the land is of dimensions and possessed of water very adequate for cultivation and for sufficient support of the petitioners and their families. The petition is evidently only for the cultivable land or the land suited to the purpose of the petition, which is repeatedly stated to be "cultivation," the petition being "without prejudice to a third party, either with repect to property or *pasture* or in any other manner." The governor, on December 31, 1845, refers the matter to the

prefect of the district for an investigation and evidently for a report, upon which a decree might be framed by him under section 4 of the regulations of 1828. The governor was required to make such a decree, and this in turn was to be forwarded to the territorial deputation under section 5 of those regulations. It can hardly be contended that this order for an investigation by the prefect was the "grant" which the governor was required to send to the deputation or assembly. The regulations and the order itself evidently contemplate something more—a definite decree by the governor conveying the title so far as he was permitted to do so. This order of December 31, 1845, therefore amounted simply to a direction for an investigation and for a provisional possession to be given the petitioners; provisional possession of the land or possessions "to which the petitioner refers." But the petition does not name any boundaries for said lands and possessions, they being simply described, as above shown, to be lands "suitable for cultivation," in a given locality. Looking therefore to the further proceedings to ascertain just what was the extent of the possession conferred, we find that on January 3, 1846, the justice of the peace was directed by the prefect to "investigate whether the land the petitioners ask for is vacant and whether, from its donation, there would not result prejudice to a third party and, there being none of this, he will proceed to grant them *as much of the land as each of them can cultivate*, under the condition that they *must fence with a regular fence*, in order to prevent damages, and that they do not obstruct the *roads*, *pastures*, and *watering places*," etc.

It is evident that the only authority the justice of the peace had to act in this matter was derived from this order of his superior officer, the prefect, and his power was circumscribed by the limitations imposed by the prefect. So far as he went beyond that power his act was void. It will be noted, therefore, that the alcalde was empowered by the prefect to "grant" them or to give them possession of only "as much of the land [i. e., the land described in the petition] as each can cultivate;" land not 17,159 acres and more in area (plaintiff's petition, R., 2), but land such as they could fence; land not for pasturage as well as cultivation, but lands such that "the roads, pastures, and *watering places* are not to be obstructed thereby." Pasturage could certainly not have been reserved to the public and at the same time granted to the petitioner; and as it is evident that it was to be reserved, it is equally evident that it was not to be granted, and that all that was to be granted was "as much as each can cultivate," as much as each can fence "with a regular fence." It is inconceivable that in those primitive days, long before the era of barbed wire, and when the only fences were those laboriously constructed of wood, that the condition to inclose the tract with "a regular fence" would have been imposed had this been a tract of over 17,000 acres. On the other hand, had the cultivable land only been granted, it is very readily seen that this would harmonize with the fence requirement, which was "to prevent damage," evidently, to the crops; it could not have been to the pasture, for that was not to be obstructed. If the requirement was that a tract of more than 17,000 acres was to be fenced, the claim must

fail for the reason that there is no proof of the construction of the fence, and its nonconstruction was thus an unfulfilled condition, which is fatal to a confirmation under subsection 8 of section 13 of the act of March 3, 1891, making a performance of all conditions and requirements, antecedent or subsequent, a prerequisite to a confirmation. (See *Cessna* v. *United States*, 169 U. S., 165.) As a matter of fact, however, while the parties were required to fence their entire possession, that possession was only the cultivable land, and this they did fence. The extent of this is shown (R., 8 and 9) by the testimony of Ezra Redding, in part as follows:

Q. Who occupied this, if anybody, when you first knew it?

A. Felix Gonzales.

Q. Is he one of the parties from whom you purchased the property?

A. Yes.

Q. What interest did he claim to have in it?

A. Two-thirds, I believe.

* * * * *

Q. What was he doing?

A. Farming.

Q. Did he have his residence there?

A. Yes.

Q. How much of a house did he have?

A. He had an adobe of two rooms; he had a two-roomed log house, if I am not mistaken; they were together.

Q. What cultivated lands did he have there, if any—Felix Gonzales?

A. Several hundred yards square.

Q. Did you see any inclosure?

A. Yes.

Q. What were they?

A. Fences.

* * * * *

Q. When you first knew this property, Felix Gonzales was occupying it?

A. Yes.

Q. He was claiming a two-thirds interest in it?

A. I think he had that; I am not certain what he claimed.

Q. He claimed a large interest?

A. Yes.

Q. He was the only one living there at that time?

A. Yes.

Q. On this tract?

A. Yes.

Q. He was cultivating, you say, several hundreds square.

A. Yes; I think he was.

Q. How many acres, at the outside, do you suppose it was?

A. Well, it might have been 12 or 15 acres, may be 20; I do not know particularly.

Q. You do not think it was more than 12 or 15 acres?

A. No; there was other land he had not in that year.

Q. How much did he have inclosed?

A. Several hundred yards; I did not particularly notice it.

Q. All the land he had cultivated was in this inclosure?

A. Yes; I think so.

Q. That was the inclosure around his residence?

A. Yes.

Q. There was no other inclosure on the property that you know of?

A. No; not that I recollect.

The testimony of Antonio Laforet, the only witness examined in the court below as to the status of the property prior to 1846, also throws light on this subject.

Q. These three people you have mentioned, Carlos Santistevan, Julian Santistevan, and Jose Manuel Garcia, they were the only people that you saw on that land at the time you were there that you knew, were they?

A. Yes, sir.

Q. How much land did Julian Santistevan occupy?

A. I do not know.

Q. He was farming a small tract, was he?

A. Yes; there was a planting strip.

Q. Carlos Santistevan, he was cultivating a small strip, too, was he?

A. The planting portion of the farm was together.

Q. How many acres did they plant there?

A. I can not state.

Q. As much as 5 acres?

A. It is impossible to say. I do not know how much an acre is.

Q. How many varas were they planting?

A. It may be 100 varas.

Q. Not more than that?

A. Yes; the bottom was small.

Q. Manuel Garcia, how many acres was he cultivating?

A. He also has a strip; I do not know how much; very little, also.

It will thus be seen that the justice of the peace was limited in giving the possession by the amount each could cultivate, and this amount, as fixed by their possession prior to 1846, was only a few hundred varas, or yards, along the little rivulet called the Lama, a water source that is itself dry a large part of the year (R., 19).

That the justice recognized this limitation is shown by the act of possession dated March 20, 1846, wherein he says that he is acting under the decree of the prefect dated January 3, 1846, and wherein he further says that the petitioners rejoiced at being the lawful owners of "the land which they desired to irrigate with the water of the Rito de la Lama." In the same instrument he says "that the *pastures, roads, and watering places are left free* toward the east from where it may not be possible to irrigate, without right to prevent pasturing because of being possessors;" and they are also "obligated to fence with a regular fence so as not to have to claim damages." It is true that the alcalde delineates certain natural boundaries, which are now alleged to contain over 17,000 acres; but it is manifest that if his intention by so doing was to give the petitioners the whole of that area, his act was in excess of the power conferred upon him by the prefect, which, as above shown, was to give to the parties possession of only "as much of the land as each can cultivate." The proof clearly shows that the Lama is adequate for the cultivation of only a small portion of the area here claimed (R., 13, 14, 18, and 19); and it is a matter of common knowledge that in the arid regions of the West the only cultivable land is that which lies in the immediate valley of the water course, the land on the elevated portions of the valley, away from the water course, being suitable only for pasturage and the like. It is evident, however, that in the delineation of these boundaries the alcalde did not intend that the title to the entire area within such boundaries should pass to the petitioners. He expressly precludes such a theory

by the plain recitals of his act of possession, wherein he says that the pastures, roads, and watering places are to be left "free toward the east from where it may not be possible to irrigate." By being left free, it is evident that they were left public. But if they were free and public under the Mexican Government, they were free in 1846, when this territory was acquired from Mexico, and are free to-day. The Government is under no obligation to give claimants more than they could have gotten under the former government. Its duty ends when it recognizes title to the extent that the Mexican Government recognized it. But to confirm this entire tract is to give a patent for the entire tract; in other words, is to vest exclusive and absolute title to all the lands—pasture lands as well as irrigable or cultivable lands—in the claimants; when the prefect who ordered the possession says "the roads, pastures, and watering places are not to be obstructed," and when the alcalde who gave possession says that such "roads, pastures, and watering places toward the east from where it may not be possible to irrigate" shall be left "free." The proof in the record on the extent of the irrigable lands is not very full, for the reason that the court below (R., 19) limited the inquiry of the Government on this point as immaterial. It is respectfully submitted that this consideration is a most material one, and that if this claim be held, notwithstanding the other grounds he hereinbefore urged, to be entitled to confirmation, the cause should be remanded for further proof as to the extent of the irrigable lands, as distinguished from pasture lands in the Lama Valley,

and for a decree of confirmation only to the extent of such irrigable lands.

A kindred defect in the decree in this case is the fact that it carries the grant to the top of the mountain on the east. This is a matter of more than ordinary importance from the fact that the mountain range referred to is quite lofty and is in a section of New Mexico exceedingly rich in mineral. It is difficult to see upon what ground the court carried the confirmation to the top of the mountain. The title paper does not say "the top of the mountain," but simply "the mountain." There is nothing in the oral evidence to indicate that the top of the mountain has ever been claimed or considered as the boundary on the east, so that the holding of the court must have been simply on the bare proposition that where a boundary given is "*la sierra*" (the mountain) it means as a matter of law the top or summit of that mountain. To this proposition the Government can not yield its assent. The exact meaning of the word "mountain" as a boundary seems not to have been to any extent the subject of consideration by courts of last resort, and barring certain *dicta* in a California case, presently referred to, the only authorities on this subject the writer has been able to find are those contained in the Land Office reports of this Government in construing this language in private land claims. In the survey of the innumerable grants in California made under the Mexican Government the uniform interpretation given the word "mountain" as a boundary has been "the foot of the mountain." Such a construction was adhered to by the Land Depart-

ment of this Government throughout the whole treatment of the subject of Mexican grants in California, and the absence of adjudicated cases shows that it was as steadily acquiesced in by the claimants of those grants. This construction by the department intrusted with this peculiar duty of locating boundaries under Mexican and Spanish grants is, under the frequent decisions of this court, of persuasive weight, and when the acceptance of this construction by the Mexican grantees and those who were claiming under them—all of whom were presumably acquainted with the boundaries of their own tracts—is considered, such construction so acquiesced in becomes of great weight. The first case of this character (decided December 17, 1873) is found at page 589 of Copp's Public Land Laws, in connection with the survey of the Rancho Caslamayomi, where the following is found:

> Where the final decree of confirmation under the act of March 3, 1851, confirmed the title to a tract of land containing "8 square leagues of land, a little more or less, as shown by the map or diseño in the expediente, and in the boundaries described in the titulo," and the diseño shows a larger tract of land than any other part of the expediente: *Held*, that this was a confirmation according to the boundaries laid down in the titulo. *Held*, also, that where the western boundary of a grant was "mountains covered with red woods," the foot of such mountains on the east was meant.

This decision of the Commissioner of the General Land Office was affirmed July 13, 1874, by the Acting Secretary of the Interior. The ruling was reaffirmed on

September 18, 1874, in the Rancho Los Prietos y Najalayegua (Id., 590–599) in the following language:

> Where one of the calls for boundary of a grant is a mountain represented on a diseño, the foot of such mountain is the true boundary.

Not only was this construction given to all private land claims in California, but also to all in New Mexico, surveyed under the act of July 22, 1854. It is believed that not a single one of the Spanish and Mexican grants presented under the act of 1854 in that Territory and surveyed under direction of the General Land Office has ever been carried to the top of the mountain where there is a call for a "mountain" as a boundary. The question of adhering or not to the rule adopted in the California grants was considered by the Land Department in the case of the Ramon Vigil grant in New Mexico, confirmed by act of Congress, approved June 21, 1860 (12 Stat., 71). We quote as follows from the opinion bearing date April 10, 1883 (Decisions of the Department of the Interior relating to Public Lands, Vol. 1, pp. 288–290):

> The western boundary is described in the petition of Sanchez (the only description found in the original title papers) and in the petition of Ramon Vigil to the surveyor-general as the Rocky Mountains. In the report of the deputy surveyors who made the survey, and in the protest of Mr. Hayes, the mountain range made the western boundary of the surveyed tract is called the Sierra Madre. No other mountains are alluded to by either, and from the description of the northern boundary line in the field notes and of the surveyed tract in the deputy

surveyors' report it appears that this is the first mountain range west of the Rio Grande answering the descriptive call.

The survey makes the foot or base of the range the boundary on the west. The protest and objection of Mr. Hayes is limited to this part of the survey, the ground of complaint being that the line is run at the foot instead of the summit, or ridge, "thereby," as alleged, "attempting to materially reduce the quantity of land in fact granted."

The only question, therefore, remaining to be considered is as to whether the base or the summit of the mountains should constitute the boundary. The protestant contends that "it always was and is yet the custom and understanding in Mexico (and consequently in New Mexico) that a mountain boundary embraced to the summit unless otherwise specifically expressed."

I do not so understand the rule. Where an object boundary of extent is named, it stands to reason that the side of the object nearest the tract to be bounded, unless some other part be particularly designated, should be taken as the boundary; and upon this principle it has always been held in this Department, in locating Mexican grants in California, that where a mountain has been made the boundary, without more specific designation, the proximate foot or base is to determine the boundary line.

The rule was so held by this office December 17, 1873, in the case of Rancho Caslamayomi, affirmed by the Department on appeal August 13, 1874. (1 C. L. L., 589.)

The same was held by this office in the case of the Rancho Los Prietos y Najalayegua, decided September 18, 1874, where one of the calls was a mountain represented on a diseño. (Id., 591.)

In the matter of the survey of the Rancho Agua Caliente, Vallejo confirmed for part and Leavenworth for another part. The description in the case of Vallejo was "the hills and mountain which intervene and separate the rancho of George Yout;" and in the Leavenworth case "the mountain dividing Sonoma from Napa." This office decided, February 21, 1878, in the case of Vallejo, that "the boundary must follow along the foot or base of such hills or mountains," and that of Leavenworth that "the foot of the mountain should constitute the boundary."

In a subsequent review of the latter case, April 24, 1878, this office, in reply to an application of Hon. Henry S. Foote, asking for certain modifications of the decision, and as to the mountain boundary claiming that there was a well-defined range of hills or mountains between Sonoma and Napa, and that the summit or ridge thereof should be adopted as the boundary, made the following statement of the rule:

"The rule is well settled in regard to cases like this, that where hills, mountains, or mountain ranges are named as boundaries, the foot or base is to be taken as the boundary indicated, unless the top ridge or summit is clearly indicated as such."

Appeal was taken to the Department in the case, both of Vallejo and Leavenworth, but withdrawn as to that of Leavenworth; but as both cases were embraced in the same decision, both were before the Department; and by its decision of January 9, 1879, the decision of this office as to the mountain boundary in the case of Vallejo was affirmed, and in that of Leavenworth expressly approved.

If I entertain doubt as to the proper location of the boundary under consideration, as matter of construction having reference to the descriptive call, which I do not, the decisions cited above abundantly

> settle the question. In accordance with them the boundary must be held to be properly located, and the survey is hereby approved.

This repeated interpretation of a term of description, announced in 1873, reaffirmed in 1874, followed in 1878, approved in 1879, and again approved in 1883, is entitled to great respect. When it is reflected that the consideration of this matter extended over a period of ten years, under three different administrations, and was in connection with precisely the same subject-matter as is here involved, it is entitled to still greater respect. As was said in *United States* v. *Alabama Railroad Company* (142 U. S., 621):

> We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit.

To a grant document of this description the familiar doctrine announced in *Leavenworth, etc., R. R. Company* v. *United States* (92 U. S., 740), as to Congressional grants, is also applicable, where it is said:

> All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. * * * If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor.

It is true that in the case of *Ornbaum* v. *His creditors* (61 Calif., 459) the supreme court of that State says in the course of its opinion:

> The boundary usually goes to the middle of the natural object named except in the case of a range of mountains, when it goes to the comb or dividing line of the ridge.

An examination of that opinion will show that this statement, unsupported by a single citation of authority, is the purest *dictum*. That case, it will be noted, is one involving the right to a homestead, and the only way in which the discussion of the matter of a mountain got into the record at all was because the piece of land claimed as a homestead was described as bounded on the south by the Redwood Mountains, and it was contended that it was not thereby particularly or definitely described. It is manifest that a decision as to whether or not such a description is sufficiently definite is a very different matter from deciding as to whether such a call means the top or the foot of the mountain. The latter proposition was not involved in the case and its decision was not necessary to a determination of the case. It was not discussed by counsel, and in the head note of the case, which presumably contains a statement of what the case decides, it will be noted that there nowhere appears the proposition that "a mountain" in a description of land boundaries means "the top of the mountain." The head note does contain a statement of the proposition that "a mountain or range of mountains is a definite boundary of land," and that is all that was involved in the case on this point, and is all that was material to a determina-

tion of the case on this point. It is further true that the court below, in one of the early cases decided by it, followed this *dictum* in the California case and held that the term "mountain" meant "the top of the mountain." That decision, however, was, it is respectfully submitted, based upon a misapprehension of the force of this California case and upon an oversight of the decisions above cited *contra*. There is this further distinction, that in that case there was abundant oral proof showing use and occupation to the top of the mountains, and thus a practical construction of the title by the parties at interest, whereas here there is an entire failure of such proof.

It is respectfully submitted that the claim here presented should be remanded to the court below, with directions to reject the claim and to dismiss the petition, or, in the event that the same be held entitled to confirmation, the decree should be modified in accordance with the contentions last above urged.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

WILLIAM H. POPE,
Special Assistant to the Attorney-General.

APPENDIX No. ONE.

His excellency the governor of this department of New Mexico, Don MANUEL ARMIJO:

I, Carlos Santiestevan, for myself and in the name of five other associates, all residents of the town of Los Dolores, in the the district of Taos, before your excellency in due form and as may be best allowed by law, represent and state: That, finding ourselves without land as property to cultivate for the support of our persons and needy families, and having seen a vacant tract of land very suitable for its cultivation, irrigable by certain waters which they call [the water] of the Lama, quite sufficient for its irrigation, at the place which is so-called and even another place which they call the Sebolla, and which are between the settlement of the Rio Colorado and San Cristoval, pertaining to said demarcation of Dolores de Taos, I ask and pray of the well known and accredited liberality of your excellency that, in the name of the high powers of our Republic of Mexico, you be pleased to make us a donation of said land, for it is of very adequate dimensions and water to enable it to be cultivated, and for sufficient support of the petitioners and their families, and without prejudice to a third party, either with respect to property or pasturage or in any other manner, but will rather result in very much benefit and increase of population and agriculture, and, besides relieving the necessity of the petitioners, it will also

strengthen that place or frontier which is guarded by said settlement of the Rio Colorado, from which said place it will be distant only about a league and from the settlement of San Cristoval somewhat more.

Therefore I earnestly pray your excellency to be pleased to accede to this, our petition. I declare and protest, etc.

City of Santa Fe, December 31, 1845.

At the disposition of your excellency.

CARLOS SANTIESTEVAN.

[On the margin.]

SANTA FE, *December 31, 1845.*

To the prefect of the district to ascertain if the land asked for has no owner and to cause the corresponding justice to give the possessions the petitioner refers to.

ARMIJO. [Rubric.]

JUAN BAUTISTA VIGIL Y ALARID, [Rubric.]
Secretary.

RIO ARRIBA, *January 3, 1846.*

The justice of the peace, to whom it corresponds, will investigate whether the land the petitioners ask for is vacant, and whether from its donation there should not result prejudice to a third party; and, there being none of this, he will proceed to grant them as much of the land as each of them can cultivate, under the condition that they must fence, in order to prevent damages, and that they do not obstruct the roads, pastures, and watering places, and with notice that they must keep sufficient arms for their defense.

D. LUCERO. [Rubric.]

In this third demarcation of Dolores of the district of Taos, on the 20th day of the month of March, one thousand eight hundred and forty-six, I, the justice of the peace, by virtue of law, citizen Juan Lorenzo Martinez, in said demarcation, in compliance with a decree of January 3, one thousand eight hundred and forty-six, decreed by the prefect of the second district of the north, Don Diego Lucero, to me as the justice to whom it corresponds to investigate whether the land which is asked for by the five petitioners is vacant, and, having no hindrance, I proceeded to the land, which is uncultivated and wild, and took them by the hand and leading them very slowly, and, in full right of having competent authority, I placed them in possession, in the name of God and of the high authority of our wise Mexican laws which have sufficient authority to guarantee vacant lands, that idleness may be banished and agriculture increased, as they petition, to cultivate it, inasmuch as they find themselves without land as property, and in virtue of which, at the same instant they received their granted donation, they shouted with joy, crying, Long live the renowned sovereignty of the Mexican Nation; who, protected in such manner, in jubilation thereat plucked grass, threw stones, and being lawful owners of the land they desire to irrigate with the water of the Rito de la Lama, since, relying upon that small water source, they had asked for the donation, I therefore designate to them as boundaries, on the north the boundaries of the possession of Rio Colorado, and on the south, until it reaches the boundary line of San Cristoval, and on the east, the mountain, and on the west the edge of the bluff (peñasco) of the Rio del Norte, leaving the pastures, roads, and watering places free toward the east, from where it may not be possible to irrigate without right to prevent pasturing because of being possessors; and they are also obligated to fence with a regular fence, so as not to have to claim

damages, having to keep sufficient arms for their defense; and in testimony of this donation, for all time, I authenticate it, under the authority conferred upon me, with my attending witnesses, in default of a notary public, there being none in this department, and it is done on this present common paper because there is none of the proper stamp, the new colonists obligating themselves to supply that of the proper stamp whenever they can opportunely find it; to all of which I certify.

J. LORENZO MARTINEZ. [Rubric.]

Attending witness:

JUAN JOSE CORDOVA. [Rubric.]

Attending witness:

JOSE CONCEPCION MEDINA. [Rubric.]

NOTE.—Those placed in possession in their own names and surnames are those who follow in this list of names, that they may, for the sake of good tranquillity and neighborhood, proportionately divide among themselves the land which I delivered to them without surveying it, because of the very inclement day and the great amount of undergrowth that impeded the cord, and they are in this [list]:

JUAN CARLOS SANTISTEVAN.
JOSE MANUEL GARCIA.
JULIAN SANTISTEVAN.
CARLOS ORTIBIS.
TOMAS ORTIBIS.
Valid. [Rubric.]

Attending witness:

JUAN JOSE CORDOVA. [Rubric.]

Attending witness:

JOSE CONCEPCION MEDINA. [Rubric.]

Tomas Ortivis, being one of those put in possession in this possession, at the foot of which this note is placed,

transfers it to his brother, Carlos Ortivis, his rights in the possession, and signed it before me, Lorenzo Martin, alcalde, and the said Tomas signed it with me to-day, April 7, 1850.

LORENZO MARTIN. [Rubric.]
Alcalde.
TOMAS ORTIVIS. [A cross.]

Attending witness:
RAFAEL SISNEROS. [Rubric.]
Attending witness:
MATEO ROMERO. [A cross.]

Carlos Ortivis, being one of those put in possession in in this possession, at the foot of which this note is placed, transfers it to citizen Jose Gonzales, his rights in the possession, and he signed it before two witnesses who were present; and he transfers his rights for the amount of three dry cows, one cow and calf, and a yoke of oxen; which he signed with two witnesses to-day.

CARLOS ORTIVIS. [Cross.]

Attending witness:
JOSE MIGUEL PACHECO. [Rubric.]
Attending witness:
JOSE BITOR VALDEZ. [Cross.]

No. 35.

Sup. Ct. Off. of Atty. Gen. Attorneys

Reynolds Page for Appt.

Office Supreme Court U. S.
FILED
OCT 11 1899
JAMES H. MCKENNEY,
Clerk

Filed Oct. 11, 1899.

In the Supreme Court of the United States,

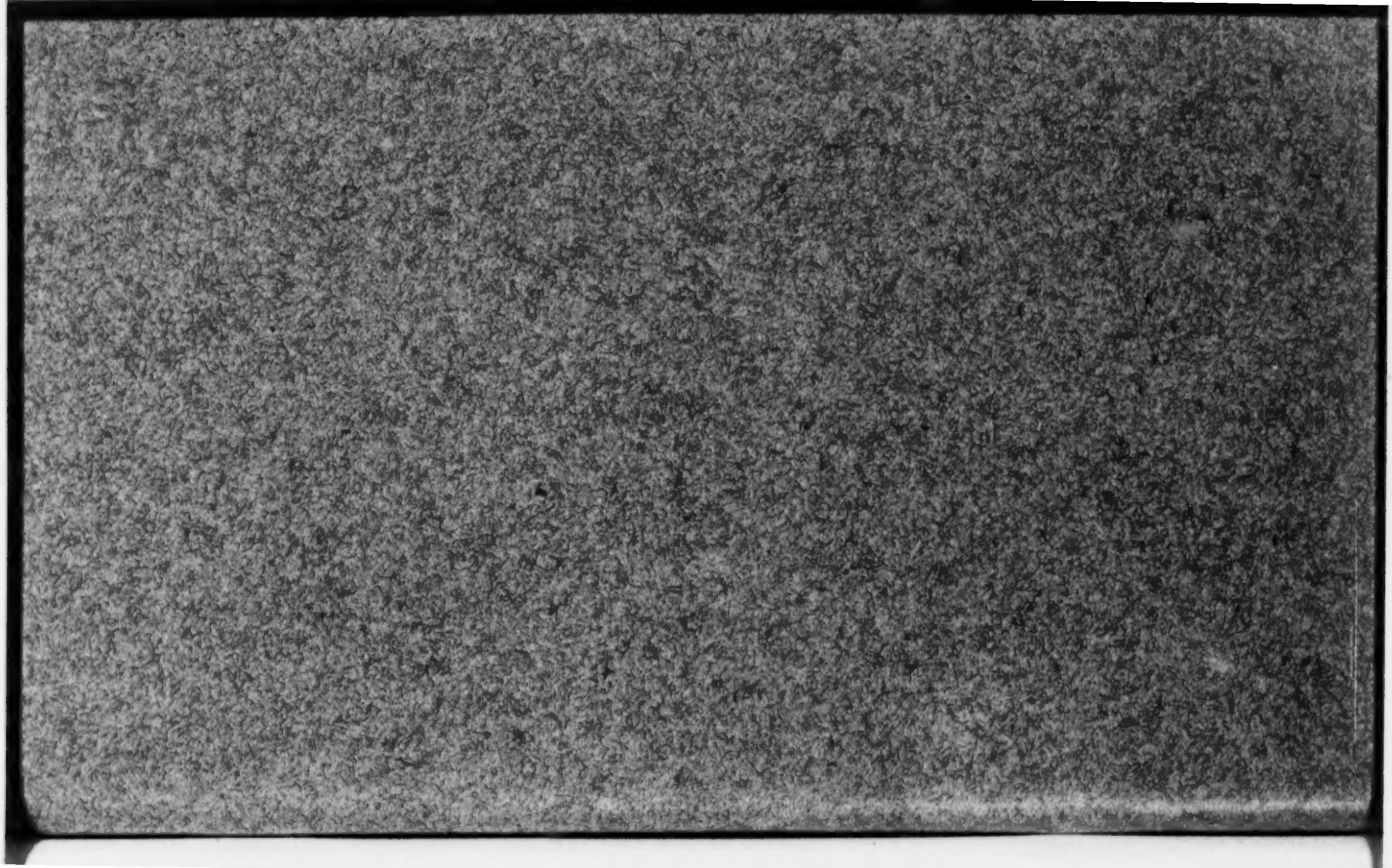
OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
CLARENCE P. ELDER ET AL. } No. 35.

CEBOLLA GRANT IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.



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SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

Under the colonization laws of the Republic of Mexico in force at the date of this alleged grant, the governor of the department of New Mexico had no power or authority to make a grant of the vacant public lands of the nation or to initiate proceedings for that purpose, and the alleged grant is void for lack of power in the granting officer.

Whatever may have been the powers of the political chiefs of the territories under the regulations promulgated by the President of the Republic on November 21,

1828 (*Hayes* v. *United States*, 170 U. S., 637, 644), it would seem that the manifest effect of the legislation applicable to the vacant lands of the Republic, subsequent to the adoption of the constitution of 1836, not only deprived all territorial or departmental officials of power to dispose of the vacant public lands, but the policy of the Government and the laws passed in relation to colonization and the appropriation of the vacant public lands for the security and payment of the debts of the nation were all repugnant to any gratuitous colonization such as was attempted to be exercised by the former political chiefs under the law of August 18, 1824, and the regulations of 1828.

It is admitted at the outset that in the departments of the Californias and New Mexico governors very often assumed to grant the vacant public lands without apparently conforming to the law of August 18, 1824, and the regulations of 1828, and apparently ignoring the existence of the constitution of 1836 and the defined powers and duties of the governors of the departments under said constitution and laws passed in conformity therewith. In fact, they seem to have ignored the Territorial councils and afterwards the departmental assemblies, whereas, under the regulations of 1828, before any act of the governor passed a definitively valid right it was necessary to receive the concurrence of the Territorial deputation or of the Supreme Government.

The test to be applied under the act creating the Court of Private Land Claims had been repeatedly announced, affirmed, and reaffirmed by this court, and at the outset

Mr. Chief Justice Fuller, in the case of *Faxon* v. *United States* (171 U. S., 244–249), said:

> In order to the confirmation of any claim, the Court of Private Land Claims, under the act creating that tribunal (26 Stat., 854, c. 539), must be satisfied not merely of the regularity in form of the proceedings, but that the official body or person assuming to make the grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified; and the same rule applies to this court on appeal. (*Hayes* v. *United States*, 170 U. S., 637; *Ely's Administrator* v. *United States*, *ante*, 220.)

It is not possible to sustain this grant under the law of 1824 and the regulations of 1828, or under the laws in relation to the vacant public lands under the constitution of 1836, for it does not conform to the proceedings provided in any of them; nor was the officer who purports to have made the grant, to wit, the governor of the department, ever vested with authority to dispose of the vacant public lands; nor is it shown in any way that there was ever an attempt in any way to ratify such unwarranted exercise of power; nor is it a case where the grant can be treated as validated by presumption, for if it were permissible under the act of 1891 to presume the validation of the exercise of unwarrated and unlawful authority, yet there is no testimony, nor is there any condition surrounding this claim to warrant the application of such a presumption.

Subsequent to 1829 the financial distress of the Mexican Republic had become so alarming that it was imperative that all the sources of revenue should be placed

within as safe and economical control as possible. This was attempted by a series of laws and treasury regulations which have been set forth and referred to in a number of cases before this court, notably, *Ainsa* v. *United States* (161 U. S., 209); *United States* v. *Coe* (170 U. S., 681, S. C., 174 U. S., 578); *Hayes* v. *United States* (*ibid.*, 637), and the case of *Faxon* v. *United States* (171 U. S., 244).

The laws in relation to revenue promulgated in 1831, just referred to, indicate the tendency of the legislation of the country to place all the property of the nation which could be properly applied to the production of revenue under the immediate control of the general department of revenues. It might well be contended that the laws and regulations of 1831 embraced within their scope and intent the vacant public lands situated in the territories of the Republic. They were certainly the property of the nation and could be subjected to the control of the revenue department for the purpose of producing income to assist in meeting the financial distress of the nation. It was provided that the proceeds from the national property should be collected by the commissariats under the immediate direction of the general department of revenues. If the effect of this legislation was to carry the vacant public lands within the territories under the control of the department of revenues, then it follows, of necessity, that the power and authority of the political chiefs and the territorial departments under the regulations of November 21, 1828, were by implication repealed and annulled, as their exercise was inconsistent with the revenue laws of 1831. (Reynolds, pp. 151 to 161.)

But whether or not such was the necessary effect of this policy, it is certain that the legislation of the country after the adoption of the constitution of 1836 and the passage of the law of April 4, 1837, was certainly to modify materially the existing colonization laws, if not to repeal them. (*United States* v. *Coe*, 170 U. S., 681, 696.) This law formed the basis for all subsequent laws upon colonization, and it is earnestly insisted on behalf of the Government that it was intended as a specific repeal of the former laws upon colonization (Reynolds, 222), except such provisions of the former as were specifically saved by the same.

It will be noted that article 11 of the law of April 6, 1830, which was reserved in force, had relation to the colonization of foreigners in the frontier States and Territories, and said article had reference to article 7 of the law of August 18, 1824, in relation to colonization of foreigners of adjacent countries in those States and Territories of the federation which adjoin their nation. It would seem from the law of April 4, and the reservation of the former prohibitions as to colonization of foreigners, that it is not reasonable to suppose that the gratuitous colonization laws and regulations could possibly have remained in force. It was said in the case of *Faxon* v. *United States* (171 U. S., 244, 254) that—

> In 1835 the State legislatures were abolished and departmental bodies established; and the bases for a new constitution were adopted, followed by such constitution dividing the country into departments, the interior government of which was intrusted to the governors in subordination to the General Government. (Mex. Laws, 75, 89, 230, 258.)

The division of the Republic, as indicated before, was accomplished by the abrogation of the office of political chief and the appointment of governors. As to the abolishment of the Territorial deputations and the appointment of departmental boards, subsequently departmental councils, the constitutional provisions and the laws passed in pursuance thereof were numerous and minute in detail, but nothing can be plainer than the fact that the colonization of the lands which are or should be the property of the Republic by sales, leases, or mortgages, as provided by the decree of April 4, 1837, was a declared purpose and direction that they should be taken out of the category of lands that could be gratuitously colonized. The vacant public lands in all the departments from this time on were continually dealt with by legislation by way of mortgages and sales.

Just prior to the enactment of the law of April 4, 1837, to wit, on January 17, 1837, all the real property of the nation that existed in all the Territories of the Republic were adjudicated to the national bank for the redemption of copper coin. (Reynolds, 210, cited *United States* v. *Coe*, 170 U. S., 691.) This was followed by the law of March 20, 1837 (Reynolds, 211), wherein the powers and duties of the governors and the departmental councils were minutely defined. In article 59, section 3 (Reynolds, 220), it is provided: "They can not exercise other powers than those which this law designates for them, the violation of this part of the article and the two preceding ones being a matter involving the strictest responsibility."

The general constitution of December 29, 1836 (Reynolds, 203, 208), also undertook to minutely define the powers and duties of the governors and the departmental councils, and contains the same restrictions, and in none of these, neither in the constitution nor in the law of March 20, 1837, are governors empowered to gratuitously grant the public lands for any purpose.

On April 12, 1837, a national consolidated fund was created to secure the payment of the principal and interest of the public debt, by which the Government especially mortgaged 100,000,000 acres of the public lands in the departments of the Californias, Chihuahua, New Mexico, Sonora, and Texas as a special guaranty fund until the extinction of the credits. It is also provided that if any of these mortgaged lands should be sold, they should be sold at the rate of not less than 4 acres to the pound sterling, and the proceeds thereof should be paid by the purchaser to the agent of the Government in London, who should apply the same to the payment of the bonds of said fund, and that the bonds were to be received in payment for said lands at the current market price of the same. (Reynolds, 223, cited Coe Case, *supra*, 691.)

On April 17, 1837, pursuant to the law of April 4, 1837, minute rules and regulations were provided for the collection and disbursement of the revenues of the Government. This law has been repeatedly under consideration by this court in the various cases cited *supra*, and it may be said to form the rules and regulations for the sales, leases, and mortgages of the vacant public lands, as

well as all other property of the nation. The chief officer of this department was called the superior chief of the treasury. (Reynolds, p. 224.)

On September 15, 1837, a convention between the English bondholders and the Mexican Government was entered into. Article 4 thereof provides that the deferred bonds should be received at any time in payment of the lands that may be found unoccupied in the departments of Texas, Chihuahua, New Mexico, Sonora, and the Californias at the option of the purchaser at the rate of 4 acres per pound sterling. This law repeats article 7 of the law of April 12, 1837, creating the national consolidated fund, adding the following (Reynolds, p. 229):

ARTICLE 7. * * * The Mexican Government, besides the general mortgage contained in this article, expressly reserves by a public decree twenty-five million acres of the lands of the Government in the departments of closest communication with the Atlantic, and which appear most suitable for colonization from the outside. Said lands shall be specially and exclusively set aside for the deferred bonds, in case it is desired to exchange them for lands; and if the Government sell them, the proceeds therefrom shall be devoted to the redemption of said bonds.

By law of December 7, 1837 (Reynolds, p. 230), it was made the duty of the governors to "preside over the boards of sale and of the treasury, with power to defer the resolutions of these latter, until in the first or second session thereafter the matter under consideration is more thoroughly examined into." (*Foxon* v. *United States*, 171 U. S., 255.)

On June 1, 1839, the convention of Mexican bondholders entered into on September 15, 1837, was approved. Article 3 provided:

> 3. With respect to the colonies that may be established by virtue of the convention, the Government shall see that the existing laws on colonization, or those that may be enacted hereafter, are observed in so far as they are not contrary to the convention itself.

This law, in addition to approving the convention, provided that a bureau of colonization under the immediate orders of the supreme Government should be created as soon as possible. The regulations pursuant to the same were not adopted until 1846, when the bureau of colonization was provided by decree of November 27, 1846. (Reynolds, 261.) Regulations were promulgated and circulars issued to carry the same into effect on December 4, 1846. (Reynolds, 263, 281.)

From April, 1837, to October, 1841, the Government of Mexico was under the administration of General Bustamente as President, but upon the latter date he was driven from the capital and Santa Anna was placed in control of the Government under what were known as the bases of Tacubaya. (Reynolds, 234.) It is believed by counsel for the Government that these bases constituted a provisional constitution for the formation of the Government under President Santa Anna, retaining, however, the constitution of 1836 in force, except wherein modified by said bases or where inconsistent therewith.

It will appear by subsequent legislation that the laws on colonization just referred to were not changed by the

new government, but recognized as in force. By law of December 16, 1841, the superior chief of the treasury, created under the law of April 17, 1837, was abolished, and his duties devolved upon the departmental treasuries. (Reynolds, 238.)

On June 13, 1843, bases for political organization of the Republic were adopted (Compiled Laws, Vol. IV, p. 429; Reynolds, 243), departmental councils were abolished, and the departmental assemblies created. This decree defines the powers and duties of the departmental assemblies, among which may be found (article 134, section 5):

> To decree what is convenient and in harmony with the laws with respect to the acquisition, alienation, and exchange of the property (*bienes*) that may belong to the community of the department. As to the alienation of lands (*terrenos*), the existing laws and what the colonization laws provide shall be observed. (Reynolds, 244.)

Governors are provided for and their powers and duties defined, and an examination does not disclose any power or authority upon the governor of the department to dispose of vacant public lands at his pleasure.

By law of December 9, 1843 (Vol. IV, Mexican Laws, 666; Reynolds, 250), the value of public lands not on the frontier and not affected by any other obligation is applied to the payment of the credits caused by the redemption of copper coin.

On December 29, 1843, article 1 is construed to mean that it mortgages for the payment of the credits caused by the redemption of copper coin only a portion of the

public lands equivalent in value to said debt. (Vol. IV, Mexican Laws, 722; Reynolds, 251.)

August 4, 1846, the Plan of the Citadel was promulgated, which marked the end of the first epoch of the central system of government of Mexico (Reynolds, 253); on August 22, 1846, the constitution of October 4, 1824, was provisionally reestablished (Reynolds, 256); on September 17, 1846, the revenues were classified (Reynolds, 257), and on November 27, 1846, a bureau of colonization was established pursuant to the law of June 1, 1839, which ratified the convention with the bondholders dated September 15, 1837 (Reynolds, 261). The organization of this bureau of colonization was, as above pointed out, followed by regulations dated December 4, 1846. (Reynolds, 263.) It seems impossible that the legislation above referred to, from 1837 to 1846, could have been in force in the various departments of the Republic and recognized as the law of the land, and yet the governors of the departments of New Mexico and the Californias have been empowered to continually dispose of the vacant public lands without limit or restrictions, conforming to no law, and without any known authority. It is clear that they did not conform to the law of August 18, 1824, and the regulations of 1828, but seemed to exercise the right of disposing regardless of any law or limitations that may have been imposed upon that exercise of power.

The object and purpose of this summary is to show that the vacant lands in the various departments were appropriated by law to purposes other than gratuitous colonization, and the officials and official bodies that

might from time to time dispose of them or regulate the same were named and their duties defined, and in none of this legislation are the governors of the departments or departmental councils, boards, or assemblies authorized to gratuitously grant the vacant public lands separately or concurrently. We have shown, as we think, an appropriation of the vacant lands in the Republic to the revenues of the country and the machinery for carrying the same into execution; and have shown the existence of the law of April 4, 1837, repealing the laws on colonization. Although Armijo, from 1842 down to 1846, sought at various times to dispose of vacant public lands in the department gratuitously and without restriction—a practice in which alcaldes, prefects, town councils, departmental assemblies, and other officials likewise indulged (see supplemental brief and abstract of archive in case of *Chaves* v. *United States*, No. 14, on docket of present term)—yet it appears by the above-cited law that he and they did so without authority. The only ground upon which the grant can be sustained is upon a presumption which is not applicable to the laws of the country or facts in the case. The cases which have been much relied upon as to the exercise of the granting power by royal governors and intendants-general have no application to the performance of any act by one who, as a public official, and not as a private agent of the King, can dispose of public lands only by virtue of a law authorizing him so to do. In the case of *Strother* v. *Lucas* (12 Pet., 410), so often quoted on the subject of presumption, the ground upon which that case really turned was not

so much the secret instructions given the intendant-general, but that he, being possessed of vice-regal authority, could make the law himself and answer alone to his superior, the King; he was the *alter ego* of the King, possessing general power and authority, and no one was authorized to inquire into the exercise thereof except his principal. This has no application in the powers and duties of public officials under laws limiting the same. (*United States* v. *Coe*, 170 U. S., 697; citing Cambuston's Case, 20 How., 59.)

It is insisted that the governor of the department of New Mexico was without lawful authority to make a grant of the public domain subsequent to the adoption of the constitution of 1836; hence the so-called grant of December 31, 1845, should be rejected as having been made without lawful authority.

Respectfully submitted.

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